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IFW
AF/376

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:)
Wayne Clement Sigl)
Serial No.: 10/037,377)
Filed: December 31, 2001)
Title: Labial Pad)

Group Art Unit: 3761
Examiner: Karin M. Reichle
Confirmation #: 6501

REVISED APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
Post Office Box 1450
Alexandria, VA 22313-1450

Dear Sir:

The Applicant respectfully submits the enclosed Revised Appeal Brief pursuant to 37 C.F.R. 41.37(c) and requests that the Examiner's final rejection of Claims 1, 5, 8-11, 13-15, 19, and 22-25 be reversed and that the application be remanded to the Examiner for allowance.

I. REAL PARTY IN INTEREST

The assignee Kimberly-Clark Worldwide, Inc. is the real party in interest.

II. RELATED APPEALS AND INTERFERENCES

The Applicant, Applicant's legal representative, and assignee have no knowledge of other appeals or interferences that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

Claims 1, 5, 8-11, 13-15, 19, and 22-25 are pending, with Claims 4, 12, 18, and 26 previously withdrawn and Claims 2, 3, 6, 7, 16, 17, 20, 21, and 27-40 previously canceled. The Applicant appeals the final rejections of Claims 1, 5, 8-11, 13-15, 19, and 22-25.

IV. STATUS OF AMENDMENTS

The Applicant filed an Amendment After Final on June 22, 2004, which included a substitute Abstract, a proposed amendment to the specification, and proposed amendments to Claims 1, 5, 8, 11, 15, 19, 22, and 25. In an Advisory Action mailed July 21, 2004, the Examiner indicated that the proposed amendments would not be entered because they raised new issues that would require further consideration and/or search and because they were not deemed to place the application in better form for appeal. Accordingly, Claims 1, 5, 8-11, 13-15, 19, and 22-25 (attached hereto as Appendix A and last amended on February 4, 2004) are the subject of this appeal.

V. SUMMARY OF CLAIMED SUBJECT MATER

The present invention describes and claims an absorbent article, such as a labial pad, configured for disposition primarily within the vestibule of a female wearer. The claims were previously subject to restriction/election, and the Applicant restricted the invention to Group I, recited by Claims 1-37, and elected the species shown in Figures 3-8, recited by Claims 1-26.

Referring to independent Claims 1 and 15, the absorbent article (40 in Figures 3, 5, 6) generally includes a liquid permeable cover (62 in Figure 4), a liquid impermeable baffle (64 in Figure 4), an absorbent (66 in Figure 4) disposed between the cover and the baffle, and a retainer flap (67 in Figures 3-8) extending over a portion of the baffle. (Application, p. 10, lines 11-20).

The liquid permeable cover (62) is optional and provides a comfortable surface on the body-faceable surface of the absorbent article to direct exudates away from the body, through the cover, and toward the absorbent. (Application, p. 15, line 10 through p. 16, line 28). The liquid impermeable baffle (64) resides on the surface of the absorbent article opposed to the body-faceable surface and permits passage of air and moisture vapor out of the absorbent while blocking passage of fluids. (Application, p. 14, line 29 through p. 15, line 9). The absorbent (66) provides sufficient capacity to absorb and retain the exudates and includes a first outer perimeter (95 in Figures 3, 4). (Application, p. 12, line 7 through p. 14, line 28; p. 19, lines 30-33).

The retainer flap (67) extends over the baffle (64) and covers greater than about 40% of the surface opposed to the body-faceable surface such that the baffle is between the retainer flap and the absorbent, as shown in Figures 4-6. (Application, p.

22, line 26 through p. 23, line 2). The retainer flap (67) includes an outer perimeter having a first portion (90 in Figures 3-8) proximate to and generally attached at or adjacent to the first outer perimeter (95) of the absorbent (66). (Application, p. 19, lines 19-35). The retainer flap (67) also includes a second portion (94 in Figures 3-8) extending across an outer surface of the baffle (64) and covering a portion of the baffle, as shown in Figures 4-6. (Application, p. 20, lines 1-6). The second portion (94) of the retainer flap is displaceable from the baffle to define a first cavity (96 in Figure 6) between the retainer flap and the baffle. (Application, p. 21, lines 13-26).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

- A. Claims 1 and 13-15 stand rejected under 35 U.S.C. Section 112, second paragraph, as being indefinite.
- B. Claims 1, 5, 11, 13, 15, 19, and 25 stand rejected under 35 U.S.C. Section 103(a) as being unpatentable over Molnlycke PCT '008 in view of Lassen '062.
- C. Claims 8-10 and 22-24 stand rejected under 35 U.S.C. Section 103(a) as being unpatentable over Molnlycke PCT '008 in view of Lassen '062, Lenaghan '326, and Srinivasan '567.
- D. Claim 14 stands rejected under 35 U.S.C. Section 103(a) as being unpatentable over Molnlycke PCT '008 in view of Lassen '062, Houghton '950, and Richardson '466.

VII. ARGUMENT

- A. Claims 1 and 13-15 are Definite Under 35 U.S.C. Section 112, Second Paragraph.

Pending Claims 1 and 15 recite "a retainer flap extending over said baffle and covering greater than about 40 percent of the surface opposed to the body-faceable surface." Pending Claims 1 and 15 later recite "whereby said retainer flap covers a portion of said baffle." The Examiner asserts that if the retainer "flap covers 100% of the surface as set forth on lines 9-10 [of Claim 1] than [sic] the flap covers more than

just a portion of the baffle as set forth on lines 17-18 [of Claim 1].” (Final Office Action mailed April 22, 2004, page 3, para. 7; emphasis added.) The Examiner applies the same rejection to Claim 15 and notes dependent Claims 5, 8, 11, 19, 22, and 25 “set forth the range being less than 100%.”

The Applicant respectfully disagrees with the Examiner’s interpretation of the claims. The Examiner has incorrectly interpreted the term “portion” (as used in Claims 1, 5, 8, 15, 19, and 22) and the term “part” (as used in Claims 11 and 25) to exclude “total” or “100%” as if the claims recited “only a portion” or “only a part”, respectively.¹

Claims 1 and 15 use the transitional term “comprising” and are therefore correctly construed as open-ended claims. As such, a retainer flap “extending over said baffle and covering greater than about 40% of the surface opposed to the body-faceable surface” may indeed cover as much as 100% of the baffle. Even so, such a retainer flap still covers at least “a portion of said baffle” as recited in the claims. Therefore, Claims 1 and 15, as well as the claims dependent therefrom, are definite under 35 U.S.C. Section 112, second paragraph.

B. Claims 1, 5, 11, 13, 15, 19, and 25 are Patentable Under 35 U.S.C. Section 103(a) Over Molnlycke PCT ‘008 in View of Lassen ‘062.

Independent Claims 1 and 15 were rejected under 35 U.S.C. 103(a) as being unpatentable over Molnlycke PCT ‘008 in view of Lassen ‘062. The Examiner asserts that Molnlycke PCT ‘008 “includes all of the claimed structure except for the absorbent article being configured for disposition primarily with a vestibule of a female wearer.”

¹ See Mars, Inc. v. H.J. Heinz Co., No. 03-1617 2004 U.S. App. LEXIS 15640, at *4 (Fed. Cir. Jul. 29, 2004) (holding that a claim to a mixture containing named ingredients is open-ended and is not limited to a mixture containing only the named ingredients.)

(Final Office Action mailed April 22, 2004, page 5, para. 11.)

The Applicant respectfully submits that the cited references cannot be combined as suggested by the Examiner to render the claimed invention obvious.

Lassen '062 discloses an anatomically conformable labial sanitary pad.

Figures 1 and 2 of Molnlycke PCT '008 illustrate an embodiment having an elastic sheet 4 on the body faceable surface of an absorbent article. Thus, Figures 1 and 2 of Molnlycke PCT '008 clearly do not teach the limitation "a retainer flap extending over said baffle and covering greater than about 40 percent of the surface opposed to the body-faceable surface" as recited in Claims 1 and 15.

Furthermore, Molnlycke PCT '008 teaches that the embodiment illustrated in Figures 1 and 2 includes "a narrow sheet 4" (page 2, line 13), and Figures 1 and 2 illustrate a sheet 4 that covers less than approximately 20 percent of the baffle. For this embodiment, Molnlycke PCT '008 explicitly teaches away from a flap covering greater than about 40 percent of the surface opposed to the body-faceable surface, as follows:

In order to convert such an article into package form, it is necessary first to bring the sheet 4 to the opposite side of the absorbent body prior to folding the article and then to tuck the opposite end of the article into the space defined between the sheet and envelope. (Molnlycke PCT '008, p. 3, line 36 through p. 4, line 3).

Thus, the sheet 4 illustrated in Figures 1 and 2 and described in Molnlycke PCT '008 necessarily covers a limited amount of the baffle to prevent covering the absorbent body 1 and to facilitate the principle operation of "tucking" the opposite end into the inverted sheet. Modifying Molnlycke PCT '008 to cover greater than about 40 percent of the outer layer 3, as the Examiner suggests, would interfere with the absorbent body 1,

preclude simply “tucking” the opposite end of the absorbent article into the inverted sheet, and would substantially change the principle of operation taught by Figures 1 and 2 of Molnlycke PCT ‘008.² Therefore, the Applicant respectfully asserts that Figures 1 and 2 of Molnlycke PCT ‘008 cannot form the basis of the obviousness rejection.

Figures 3-5 of Molnlycke PCT ‘008 illustrate an incontinence protector for men having a sheet 4 on the outer surface thereof. As described on page 4, line 25 through page 5, line 3 of Molnlycke PCT ‘008, this embodiment “comprises a bag-like container” with “an aperture 5 through which the wearer’s penis and scrotum can be inserted into the protector.” As such, combining the embodiment illustrated in Figures 3-5 and described in Molnlycke PCT ‘008 with the teachings of Lassen ‘062 to create an “absorbent article being configured for disposition primarily within a vestibule of a female wearer” as recited in Claims 1 and 15 completely changes the principle of operation and renders the embodiment illustrated in Figures 3-5 unsatisfactory for its intended purpose.³ Therefore, the Applicant respectfully asserts that Figures 3-5 of Molnlycke PCT ‘008 cannot form the basis of the obviousness rejection.

Additionally, it is respectfully submitted that merely combining elements found in various prior art patents to produce the Applicant’s claimed invention is not a proper

² See In re Ratti, 270 F.2d 810 (C.C.P.A. 1959) (rejecting an obviousness rejection based on a combination of references that would require a substantial reconstruction and redesign of the elements shown in the primary reference as well as a change in the basic principle of operation of the primary reference).

³ See In re Gordon, 733 F.2d 900 (Fed. Cir. 1984) (reversing a finding of obviousness because the proposed modification would render the primary reference unsatisfactory for its intended purpose).

basis for a 35 U.S.C. § 103(a) rejection.⁴ “Virtually all inventions are necessarily combinations of old elements. The notion, therefore, that combination claims can be declared invalid merely upon finding similar elements in separate prior patents would necessarily destroy virtually all patents and cannot be the law under the statute, ‘103.’”⁵ Thus, the task of the Patent Office is essentially a burden of proof not just to show prior patents with selected elements similar to respective parts of a claimed combination, but to show teachings to support obviously combining the elements in the manner claimed. It is respectfully submitted that the Office Action fails to show where Molnlycke PCT ‘008 and Lassen ‘062 provide the motivation for obviously combining their respective technologies in the manner claimed by the Applicant in the claimed invention.

Therefore, the Applicant respectfully submits that independent Claims 1 and 15 are patentable over the cited references. If an independent claim is non-obvious under 35 U.S.C. §103(a), then any claim depending therefrom is non-obvious.⁶ All of the dependent claims (5, 11, 13, 19, and 25) depend directly or indirectly from one of the two previously mentioned independent claims that are non-obvious under §103(a). The Applicant therefore respectfully submits that Claims 1, 5, 11, 13, 15, 19, and 25 are patentable under 35 U.S.C. §103(a) in view of the prior art.

C. Claims 8-10 and 22-24 are Patentable Under 35 U.S.C. Section 103(a) Over Molnlycke PCT ‘008 in View of Lassen ‘062, Lenaghan ‘326, and Srinivasan ‘567.

⁴ Graham v. John Deere Co., 383 U.S. 1 (1966) (“Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under section 103, teachings of references can be combined only if there is some suggestion or incentive to do so.”)

⁵ Panduit Corp. v. Dennison Manufacturing Co., 1 U.S.P.Q. 2d 1593, 1603 (Fed. Cir. 1987) (footnotes omitted).

⁶ In re fine, 837 F.2d 1071, 5 U.S.P.Q. 2d 1596 (Fed. Cir. 1998).

Claims 8-10 and 22-24 were rejected as being unpatentable under 35 U.S.C. Section 103(a) over Molnlycke PCT '008 in view of Lassen '062, Lenaghan '326, and Srinivasan '567. Claims 8-10 depend from Claim 1, and Claims 22-24 depend from Claim 15. As previously described in the Argument for Issue B, Molnlycke PCT '008 and Lassen '062 cannot be combined as suggested by the Examiner to render independent claims 1 or 15 obvious, and neither Lenaghan '326 nor Srinivasan '567 corrects this deficiency. For at least this reason, Claims 8-10 and 22-24 are patentable under 35 U.S.C. Section 103(a) in view of the prior art.

D. Claim 14 is Patentable Under 35 U.S.C. Section 103(a) Over Molnlycke PCT '008 in View of Lassen '062, Houghton '950, and Richardson '466.

Claim 14 was rejected as being unpatentable under 35 U.S.C. Section 103(a) over Molnlycke PCT '008 in view of Lassen '062, Houghton '950, and Richardson '466. Claim 14 depends from Claim 1. As previously described in the Argument for Issue B, Molnlycke PCT '008 and Lassen '062 cannot be combined as suggested by the Examiner to render independent claim 1 obvious, and neither Houghton '950 nor Richardson '466 corrects this deficiency. For at least this reason, Claim 14 is patentable under 35 U.S.C. Section 103(a) in view of the prior art.

VIII. CLAIMS APPENDIX

The following is a listing of the claims involved in this appeal:

1. An absorbent article, comprising:
 - (a) a liquid permeable cover;
 - (b) a liquid impermeable baffle;
 - (c) an absorbent disposed between the cover and said baffle, said absorbent article being configured for disposition primarily within a vestibule of a

female wearer, said absorbent article having a central longitudinal axis, an outer edge defining a first outer perimeter of said absorbent, a body-faceable surface, and a surface opposed to the body-faceable surface; and

- (d) a retainer flap extending over said baffle and covering greater than about 40 percent of the surface opposed to the body-faceable surface such that said baffle is between said retainer flap and said absorbent, said retainer flap having a second outer perimeter, the second outer perimeter having first and second portions, the first portion being disposed proximate the first outer perimeter of said absorbent article, and being generally attached in said absorbent article at or adjacent the first outer perimeter, the second portion of the second outer perimeter of said retainer flap extending across an outer surface of said baffle whereby said retainer flap covers a portion of said baffle, the second portion of the second outer perimeter of said retainer flap being displaceable from said baffle thereby to define a first cavity between said retainer flap and said baffle.
- 5. The absorbent article as in Claim 1 wherein said retainer flap forms a portion of the surface opposed to the body-faceable surface.
 - 8. The absorbent article as in Claim 1 wherein, for disposal, said absorbent article is adapted to be folded upon itself such that first and second opposing portions of the outer edge at the first outer perimeter are brought into face-to-face relationship with each other, and wherein said retainer flap is adapted to be folded over the opposing portions of the outer edge to thereby open the first cavity and define a second cavity receiving both of the first and second opposing portions of the outer edge thereinto with said absorbent article so folded, whereby said retainer flap retains the first and second opposing portions of the outer edge in the second cavity, and wherein a mid-section of said absorbent article extends outwardly from the second cavity and defines a portion of an outer surface of said absorbent article as so folded.
 - 9. The absorbent article as in Claim 8 wherein said retainer flap is resiliently extensible and wherein resilient forces actively retract the retainer flap about the

first and second opposing portions of the outer edge at the second cavity after the second cavity is fully formed with the first and second opposing portions of the outer edge in the second cavity.

10. The absorbent article as in Claim 8 wherein a first cavity portion of said absorbent article underlying the said retainer flap at the first cavity is configured such that the absorbent is retained between said baffle and said cover after said second cavity is formed.
11. The absorbent article as in Claim 1 wherein the surface opposed to the body-faceable surface is defined in part by said retainer flap and in part by said baffle.
13. The absorbent article as in Claim 1 wherein the first portion of the second outer perimeter extends along the first outer perimeter of said absorbent article between first and second ends of the second portion of the second outer perimeter of said retainer flap, whereby said baffle and the first portion of the second outer perimeter of said retainer flap define a closed end of the first cavity.
14. The absorbent article as in Claim 1, including printed text on a surface which assists in defining, and which is disposed within, the first cavity.
15. An absorbent article, comprising:
 - (a) a liquid impermeable baffle;
 - (b) an absorbent, said absorbent article being configured for disposition primarily within a vestibule of a female wearer, said absorbent article having a central longitudinal axis, an outer edge defining a first outer perimeter of said absorbent article, a body-faceable surface, and a surface opposed to the body-faceable surface; and
 - (c) a retainer flap extending over said baffle and covering greater than about 40 percent of the surface opposed to the body-faceable surface such that said baffle is between said retainer flap and said absorbent, said retainer flap having a second outer perimeter, the second outer perimeter having first and second portions, the first portion being disposed proximate the first outer perimeter of said absorbent article, and being generally attached in said absorbent article at or adjacent the first outer perimeter, the second portion of the outer perimeter of said retainer flap extending across an

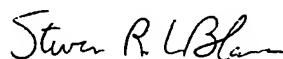
outer surface of said baffle whereby said retainer flap covers a portion of said baffle, the second portion of the second outer perimeter of said retainer flap being displaceable from said baffle thereby to define a first cavity between said retainer flap and said baffle.

19. The absorbent article as in Claim 15 wherein said retainer flap forms a portion of the surface opposed to the body-faceable surface.
22. The absorbent article as in Claim 15 wherein, for disposal, said absorbent article is adapted to be folded upon itself such that first and second opposing portions of the outer edge at the first outer perimeter are brought into face-to-face relationship with each other, and wherein said retainer flap is adapted to be folded over the opposing portions of the outer edge to thereby open the first cavity and define a second cavity receiving both of the first and second opposing portions of the outer edge thereinto with said absorbent article so folded, whereby said retainer flap retains the first and second opposing portions of the outer edge in the second cavity, and wherein a mid-section of said absorbent article extends outwardly from the second cavity and defines a portion of an outer surface of said absorbent article as so folded.
23. The absorbent article as in Claim 22 wherein said retainer flap is resiliently extensible and wherein resilient forces actively retract the retainer flap about the first and second opposing portions of the outer edge at the second cavity after the second cavity is fully formed with the first and second opposing portions of the outer edge in the second cavity.
24. The absorbent article as in Claim 22 wherein a first cavity portion of said absorbent article underlying said retainer flap at the first cavity is configured such that said baffle forms a corresponding portion of the surface opposing the body-faceable surface after said second cavity is formed.
25. The absorbent article as in Claim 15 wherein the surface opposed to the body-facing surface is defined in part by said retainer flap and in part by said baffle.

For at least the reasons discussed above, the Applicant respectfully submits that the final rejection of Claims 1, 5, 8-11, 13-15, 19, and 22-25 should be reversed and that the application be remanded to the Examiner for allowance.

Respectfully submitted,

December 2, 2004



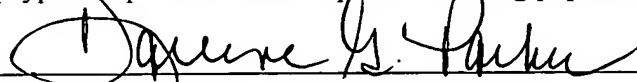
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